



**IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS**

ACTION NO. D-32/21

BETWEEN:

F-O

PETITIONER

AND

O

RESPONDENT

JUDGMENT

Before: The Hon. Mr. Justice Anthony S. Gruchot

Appearances: Ms Chloe McMillan of F Chambers for the Petitioner
Ms Lara Maroof of Maroof Law for the Respondent.

Hearing Date: 3rd & 14 November 2022

Venue: Court 5, Graceway Plaza, Providenciales.

To be Handed Down: 19 December 2022 at 3:30pm.



The Application

1. The background to this application is set out in written reasons I handed down on 28th September 2022.
2. On 13th September 2022 I ordered that the Magistrate's Court order of 7th August 2020 continue until further order of the Court. A further social welfare report was to be prepared and filed no later than 18th October 2022 and the matter be set for a review hearing on 25th October 2022. The children (D and J) were to be returned to the day-to-

day care and control of the Respondent (*referred to herein as Mr. O or the father*) by 18th September 2022.

3. On 16th September 2022, the Petitioner (*referred to herein as Ms. F-O or the mother*) filed a Notice of Appeal together with an application to stay my order of 13th September 2022 pending determination of the appeal. On 29 September 2022 I heard the stay application and on 3rd October 2022 I handed down my decision, dismissing the stay application. The children returned to the care and control of the Respondent on 3rd October 2022.
4. The social services report¹ was delayed, it being filed on 28th October 2022 (“the Report”). The Report made the following recommendations:
 - a. Moving forward, Ms F-O and Mr. O (including Ms P) regularly check any electronic devices the children have access to.
 - b. Ms F-O and Mr. O continue and complete the Department’s 12 Week Parent Education Training sessions to enhance parenting skills.
 - c. Both parents are to receive counseling intervention from Mental Health as to deal with deep seated issues regarding the tremulous relationship that they had in the past. Ms F-O to resume Substance Dependence Counseling also at Mental Health.
 - d. To ensure stability and the least disruption to the children that the children return to mother for the holiday at the end of the School Term (December 2022).
 - e. For the new school term J returns to father for school while D remains with mother. During this time both children will continue to receive counseling support from the Department of Mental Health to include issues of sexualised behaviour, incest and trauma related issues.
 - f. Both children should interchange holidays with parents (For example D is to spend holidays with father and J with mother)².
 - g. Both children are to be supervised by the Department for a period of six months after which another assessment be done.
5. The matter came back before me on 3rd November 2022 at which time Ms McMillan submitted that the Petitioner was content to proceed on the basis of those recommendations.
6. Ms Maroof, like myself had certain concerns with the recommendations, in particular the suggestion that the siblings should be separated in circumstances where they would

¹ Prepared by Ms. Raquel Remy, social worker with overview by Ms. Kelvina Capron, senior social worker.

² See paragraph 13.

not ever spend any time together, the suggestion at 6 f. above being that they are with one parent during term time and the other parent during holidays.

7. This suggestion also appeared surprising following the opinion of social worker Ms Higgins who told the Court at the 13th September hearing at which time Ms Higgins stated that in her opinion separation of siblings should only occur in the most extreme circumstances and as in her view, both parents could put in adequate safeguards she would not support separation.
8. The hearing was adjourned until 14th November 2022 at which time all 3 social workers would be requested to attend.
9. On 14th November 2022 I heard evidence from Ms Remy, Ms Capron and Ms Higgins.
10. Ms Higgins declined to give an opinion with respect to the recommendation of separating the children on the basis she had not been involved in this investigation other than as detailed in the decision of 28th September 2022. She declined to answer whether she agreed with the recommendations and stated that she had not been tasked with a role in this investigation. She further stated that a complaint had been made against her by the Petitioner's attorney following the hearing on 13th September 2022.
11. I found Ms Higgins' evidence rather guarded. Whether this was due to the complaint against her or because she did not agree with the recommendation of splitting the children but did not want to be seen going against her colleagues was unclear, I lean towards the latter. I draw that conclusion on the basis that if she agreed with the proposal then there would be no reason not to say so.
12. The main person involved in the preparation of the current report was Ms Remy. She maintained her written opinion that it was in the best interests of the children to be separated which would facilitate both children to be seen by a psychologist. She was of the opinion that separating the children would safeguard their well-being and went on to confirm that that she considered that the risk, particularly to D remained low.
13. In response to the issue of the children not spending any time together whatsoever, she confirmed that this was an error in her report and this is not what she was suggesting. She confirmed that the children should spend holidays together, with holidays being alternated between the parents.
14. Her view was that there are issues between the parents in that they are incapable of co-parenting and that interaction between them causes significant issues. When questioned whether she agreed that separating sibling was a last resort, and what the reason was for recommending this at this time, her response was that she had spoken to both parents and that they had agreed this was a workable arrangement. I formed the clear view that Ms Remy was very much responding to the parents' wishes and she confirmed that both children said they were happy when they were with their father or mother.

15. The suggested arrangement would obviously require a change of school for D as the mother has now settled in Grand Turk. Ms Remy was of the view that D would have no issues adjusting to a change of school, but that J would not be so able to adjust and the recommendation was that he remains at his present school in Providenciales.
16. Ms Remy confirmed that she had not got any update from the Department of Substance Abuse with respect to mother's alleged problems with alcohol, suggesting that Ms Higgins would have obtained that information. It transpired that the mother had unilaterally stopped attending the substance abuse counselling and that she had not been seen in 2022, the last contact with the substance abuse unit by Ms Higgins being in January 2021.
17. Ms Capron confirmed that she was the supervising social worker, that she had reviewed the report, that it had been approved by her and that she supported a separation of the children. Her reasoning for this is that in her opinion the parents are at this time not capable of co-parenting the children. She described an "*on-going battle*" between the parents and she suggests that a 6-month trial period with the children each being with one parent would assist with counselling both the children and the parents.
18. Ms. Capron stated that in her view the problem was the interaction between the parents, but that separating the children for a period would enable the sexualised behaviour to be professionally addressed and that in coming to this conclusion, the views of the children had been taken into account.
19. In response to Ms McMillan's question as to whether splitting siblings had worked in other cases, Ms Capron replied that she thought it important in this matter to let the counselling work, which she re-confirmed in response to the question by the Court as to whether it was her opinion that the children had to be separated for counselling to be effective.

Discussion

20. Ms Maroof submitted, as she had submitted on previous appearance, that the parents were tired of the ongoing litigation and both wanted resolution. She submitted that both parents could live with the recommendation further adding, if it were in the best interests of the children. She stressed Mr. O's concerns were directed at the best interests of the children.
21. Ms Maroof further submitted that it was a matter for the Court to make an assessment of what is in the best interest of the children and further, that if the Court was not of the opinion that separating the children was in their best interests, then Mr. O has demonstrated that he is better able to provide stability.
22. Ms McMillan submitted that due to the sexualised behaviour, separating the children was appropriate and that her client was seeking an order in the terms of the recommendations. She detailed how mother's circumstances had change by her moving to Grand Turk and away from Mr. O and that as a result her issues with alcohol has also

resolved, the suggestion being that it was the relationship with Mr. O that had caused her to turn to alcohol. Ms McMillan submitted that she was now being guided by professionals and is positively co-operating.

23. This is not a situation where the Court will order an outcome, just because both parents 'can live with it', nor do I believe there ever could be where the welfare of children is concerned. As I set out in my written reasons of 28th September 2022, this application has been brought under section 46 of the *Matrimonial Causes Ordinance (Cap. 11.04)*. The provisions of section 46 do not provide any criteria to which the Court should have regard when considering an application under that section; however, parallel jurisdiction is conferred on the Court pursuant to the *Family Law (Guardianship, Custody and Access to Children) Ordinance (Cap. 11.05)*.

24. Section 3 provides:

"(1) The welfare and best interests of a child must be the first and paramount consideration—

(a) in the administration and application of this Ordinance, including proceedings under this Ordinance; and

(b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child."

25. When dealing with children it is the best interests of the children that is the paramount consideration for the Court. Section 3(5) provides:

(5) In determining what best serves a child's welfare and best interests, a Court or a person shall take into account—

(b) any of the principles specified in section 4 that are relevant to the welfare and best interests of a particular child in that child's particular circumstances.

26. Section 4 then provides:

4. The principles referred to in section 3(5)(b) are as follows—

(a) a child's parents and guardians should have the primary responsibility, and be encouraged to agree to their own arrangements, for the child's care, development and upbringing;

(b) there should be continuity in arrangements for a child's care, development and upbringing, and the child's relationship with his family should be stable and ongoing (in particular, the child should have continuing relationships with both of his parents or guardians);

(c) a child's care, development and upbringing should be facilitated by ongoing consultation and cooperation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with the child;

(d) relationships between a child and members of his family should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development and upbringing; and

(e) a child's safety must be protected and, in particular, the child must be protected from all forms of violence (whether by members of his family or by other persons).

27. When deciding matters concerning the welfare of children it is not the correct approach to base a decision on one event and a holistic approach should be adopted:

"In Re G (a child) (care proceedings: welfare balancing exercise: proportionality)³ the Court of Appeal⁴ set out how the court should assess a child's best interests when presented with competing options. The judicial exercise should be to make a holistic evaluation of the realistic options for the child's future upbringing, before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare. The judicial task should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option."⁵

28. In consideration of the principles set out above I make the following observations:

- a. This is unfortunately (certainly at present), not a case where the parents can agree their own arrangements for the children's care, development and upbringing. Litigation with respect to the children has been on-going since early 2020 with cross applications for custody and some 5 social welfare reports being produced. I am told that there have been numerous court appearances before the Magistrate before proceedings were brought before me within the divorce proceedings.
- b. The continuity in the arrangements for these children following the breakdown of the relationship between the parents is far from ideal. Their residence has changed on several occasions, with them now residing back at what was the family home. They have also been forced to change schools on more than one occasion, primarily as a result of the mother moving to Grand Turk and then unilaterally deciding to breach the Magistrate's interim order. I cannot countenance her enrolling the children in a new school without reference to the father. It is beyond peradventure that these children require stability and certainty moving forward.

³ [2013] EWCA Civ 965; [2013] FCR 293.

⁴ See McFarlane LJ especially at [49]–[55].

⁵ Butterworths Family Law Service > Children > 3A Narrative > Chapter 1 Fundamental principles of the Children Act 1989 > F Promoting and safeguarding the welfare of the child.

- c. As reflected at sub-paragraph a. above, it appears that the parents are presently unable to facilitate ongoing consultation and cooperation between themselves and as such further assistance from various professionals is going to be required for the foreseeable future.
 - d. I have concerns as to the effect of the suggested separation of the siblings and how that will promote their relationship. The animosity between the parents is inevitably going to have a negative impact on the children and they should work to promote cooperation.
 - e. Ms McMillian urges me to consider the issue of safety, particularly in respect to D which she submits is a real and critical consideration. She suggests that the evidence shows that there is a clear risk of sexual abuse to D. I balance that with the evidence of the social workers. Ms Higgins who was initially involved following the disclosure in August of this year, was very clear that she considered the risk to D was low. This is reflected in the most recent social welfare report.
29. As noted above, the suggestion of separating the children is of concern to the Court. As Ms McMillan puts it:

“The courts have long recognised the importance of sibling relationships, and the core principle of the Convention on the Rights of the Child 1989, United Nations General Assembly, Resolution: 64/142, para 17 in this regard is generally applied in the English family courts:

“Siblings with existing bonds should in principle not be separated by placement in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child.”

30. I have been referred to 2 particular authorities. Ms McMillan refers to *A Local Authority -v- M and others*⁶. That case concerned 2 siblings, a girl aged 13 and a boy aged 9. The mother was a vulnerable person and the court found that whilst the parents had not tried to harm the children both children had suffered harm by the conduct of both parents.
31. That case is distinguishable to the matter at bar as the court was being asked to make public law care orders for the children, as such the considerations of ‘keeping the family together’ was in a much different context to the matter at hand where the consideration is limited to whether the children should be separated. Further, in that case there were other challenging behaviours (not present here) which the court had to grapple with, in circumstances where the court held that the children were at significant risk of harm going forward; however, the issue of separation of the children was considered as the Local Authority’s suggested care plan for the children was for them to have separate

⁶ [2019] Lexis Citation 54; [2019] All ER (D) 139 (Jun).

placements. At paragraph 145 of her judgment in the Family Court, Judge Middleton-Roy stated:

“...Cases involving the separation of siblings are never easy and this case is no exception. Sibling separation is not a decision that any of the professionals has taken lightly.”

32. In the same case the care plan, approved by the court, was for there to be sibling contact on a fortnightly basis. Judge At paragraph 152 Middleton-Roy said:

“Further, I approve the amended plan for sibling contact on a fortnightly basis. Sibling relationships are potentially the most enduring relationships of a lifetime and it is important for this relationship to be maintained, provided that it remains in their best interests individually. The plan is to provide the siblings with significant time of at least 4 hours duration to enable the carers to get together to plan activities involving quality time and with the aim of repairing some of the difficulties in their relationship.”

33. Ms. Maroof has guided me to a substantial report⁷ prepared on behalf of the Nuffield Foundation⁸. This again is predominantly directed towards public law care and adoption proceedings. The authors put forward these key messages:

“Siblings matter, but...”

There is strong recognition of the importance of sibling relationships: that they are ‘the most enduring’ or ‘longest-lasting’ relationships in most people’s lives. They are increasingly considered a relevant factor in care and adoption proceedings, but the significance attached to them is easily and routinely outweighed by other considerations. The resulting tension is such that decisions which impact on siblings are sometimes described as ‘the hardest’, ‘the most difficult’, and ‘heartbreaking’.

Contact arrangements between separated siblings are heavily determined by placement type. There is a strong assumption that direct contact is appropriate for children in placements other than adoption ...”

34. She also refers to another Family Court decision, *F -v- G*⁹. This is another 1st instance decision concerning 2 children, a boy aged 9 (child B) and a girl aged 3 (child A). The

⁷ Siblings, contact and the law: an overlooked relationship? November 2018.

⁸ The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The report is authored by Daniel Monk is Professor of Law at the School of Law, Birkbeck, University of London and Dr Jan Macvarish is a Research Assistant at the School of Law, Birkbeck, University of London and a Visiting Research Fellow at the Centre for Parenting Culture Studies at the University of Kent.

⁹ 21st December 2020 – 2021 EWFC B12.

application came before the court following reasonably amicable divorce and financial settlement proceedings.

35. The parties lived close to each other and care of the children was shared between them with support from wider family. The mother's employment had limited fixed working hours and the father held a senior position which allowed him some limited flexibility but he was largely office based.
36. The mother moved out of London to the countryside during lockdown taking the children with her. The move was intended to be temporary but at some point in the early summer the mother decided that she would like to make it a permanent move.
37. Initially the father opposed either child staying in the village where they were living but having read the reports produced in this case he accepted that the weight of opinion was in favour of child A remaining with her mother as principal carer and spending as much time as possible with him.
38. The evidence and submissions were focused mainly on what was in the best interests of child B a significant issue being the potential for separation of the children given that father sought that child B should remain in his care while child A remained principally with her mother. As the learned judge Lloyd-Jones put it at paragraph 11, "In this case, *it is not now a question of whether the mother should be given permission to move with the child, it is a fait accompli. The question is a simpler and more difficult one; is it in child B's best interests to live with his father in London or his mother in the countryside where he would also be living with his younger sister.*"
39. At paragraph 56 of her judgment she states:

"I have been very concerned about separating child B from his sister and because of the agreement between the parents I accept that A will go on living with her mother during the week. It is not attractive to split siblings as a rule but in this case child A's experience of life has been different from child B's, the time she has spent with her father has been shorter. Nonetheless it is unattractive, and I have had to consider it carefully bearing in mind that the children's welfare is paramount. I have concluded that again it is not all or nothing.

...

Although it is difficult the balance comes down firmly in favour of child B remaining with his father in London during the week in spite of the separation from his sister that will entail."

[Emphasis mine]

Consideration and analysis

40. It is in my judgment only in the most exceptional cases that siblings should be separated and I repeat that the decision should not be determined by what the parents 'can live with'. The paramount concern is what is in the best interests of the children.

41. Whilst not adopted within the Family Law (Guardianship, Custody and Access to Children) Ordinance, Ms. McMillan refers me to what has become termed 'the welfare checklist' as set out in the Children Act 1989¹⁰. Section 1(3) provides:

"In the circumstances mentioned in subsection (4)¹¹, a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

42. I have not been addressed on these criteria by either party although Ms McMillan does make written submissions in this respect and dwells somewhat on sub-section (e), which given the outcome to which she seeking to persuade me is perhaps understandable, if unfortunate. In applying that checklist to this case, I make the following observations:

a. **The ascertainable wishes and feelings of the children concerned (considered in the light of their age and understanding).** Both children have expressed that they are happy when they are with either parent and have not expressed any particular discernable preference and the view of the social workers is that both parents are capable of the day-to-day care and control of the children. The children have spent substantial time with both and over the course of the proceedings in the Supreme Court, no report has been made of any concerns either child has.

b. **Their physical, emotional and educational needs.** Concern has been raised regarding the sexualised behaviour of these sibling, particularly in light of the August disclosure. I am told by both Ms Remy and Ms Capron that the children would benefit from continuing counselling support, but the reports do not indicate any significant emotional harm has been suffered by D. The children appear well cared for when they are with either parent and it is unclear how the incidents over the period of September 2021 to May 2022 took place. The mother suggests that this was due to

¹⁰ Children Act 1989, England and Wales.

¹¹ *Inter alia* applications for or to vary orders for custody, day to day care and conduct and access.

the lack of supervision provided by father, but the social workers have no significant concerns and it is clear that the father was appalled at what had taken place and that he has now obtained a work permit for his sister to assist him in caring for the children.

It is reported that J is not functioning as he should educationally, but that his teacher is working with father to bring him along. Ms Mc Millan seeks to persuade me that D's character is such that she would not be materially affected by a change of school. I must take into account that she has already experienced a change in schooling at the end of the summer holiday as a result of the mother's actions.

- c. The likely effect on them of any change in circumstances.** As noted at paragraph 28.b above, the continuity of the arrangement for the children has not been ideal seemingly since 2020 with them experiencing a number of changes of both accommodation and schooling. The social welfare report does not address what effect any further change will have on the children, much less what effect separating the children will have, but I note that if I were to agree to a sibling separation, it is intended that the children continue to have professional support.
 - d. The age, sex, background and any characteristics of the children which the court considers relevant.** I have not been addressed on any particular issue which either of the parties consider relevant save for Ms McMillian suggesting that it would in D's best interests to be separated from her brother and that a move to living with her mother would give her the opportunity to grow in a safe environment, about which I am not persuaded is a fair submission.
 - e. Any harm which the children have suffered or are at risk of suffering.** Ms McMillian's submissions in respect of this consideration are inconsistent with the views of the social workers. There is no doubt that the events which took place between September 2021 and May 2022 are significant, but they have to be set against the backdrop of the professional assessment that the risk of any future harm is considered to be and, has consistently been considered to be low. Suggesting as Ms McMillan does, that the exhibited sexualised behaviours in this case will "*lead to life-time effects of sexual violence and abuse on the health and happiness of [D]*" is not supported by the professional evidence. The submission that there is a "*clear risk of sexual abuse*" to D likewise is not supported by the professional evidence.
 - f. How capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the children's needs.** As noted above, there are no significant concerns about either parent meeting the needs of the children with continued assistance. It appears that it is considered that the father, on balance, can provide a more stable environment for the children.
43. The question that I am tasked to decide is whether I should go against, or perhaps more properly put, whether there is good reason to go against, the settled principle that siblings should not be separated. Ms. McMillan has firmly put the mother's case that

there is, and I should accede to that request. She has strongly argued that D is at significant risk if she remains living in the same household as her brother. I do not find that there is sufficient evidence to support that contention.

44. I do not in any way suggest that the sexualised behaviour is not of serious concern, but I am mindful that this disclosure came about by accident, and not as a result of concerns being raised with respect to any change in D's day-to-day behaviour, developmental performance, or change in emotional state. There is no suggestion by any of the 3 social workers I have heard from, nor indeed by either of the parents that D has been traumatised by what occurred. That is not to say that careful consideration does not need to be given to the supervision of the children going forward.
45. I have formed the opinion that if the children are not to be separated then given the views that the father is more able to provide a stable environment for the children then he should be the main carer, but, in circumstances where the professionals consider that both parents are capable, with support, of being the main carer and the fact that the children have not expressed any real preference to be with either particular parent, this is not an easy situation; if indeed any decision by the Court in respect of children is an easy or ideal one. One factor that leans me in favour of the father is that the mother has lodged complaints in respect of 2 of the social workers involved in this matter and that leads me to question whether she is putting the best interests of the children above her own views and wishes. I do not have those concerns with the father who has demonstrated that he is putting the children first.
46. The concern over separating the siblings is a real concern in this matter as I have expressed at the hearings. This is particularly so in circumstances where I am told that the children are happy whether they are with their mother or with their father and I do not see that their wishes and feelings are particularly biased in any direction.
47. I have given this matter very careful thought. It is the very clear opinion of the social workers that the problems this family is facing results from the interaction between the parents. The major difficulties appear to have resolved somewhat with the mother's move to Grand Turk, albeit that in itself has created a difficulty with respect to access.
48. Another real factor is what has been described as litigation fatigue perceived by both parents. Whilst such fatigue is not a guiding principle as to how to decide this matter, I am of the view that having some kind of finality to these long running proceedings will assist the parents in overcoming their animosity for each other.
49. I refer to the reference at paragraph 27 above and I am of the opinion that if this family has any realistic chance of functioning with a degree of normality, which has to be in the best interests of the children, then a solution needs to be achieved whereby the parents are able to work together in the best interests of the children or to put it another way; co-parent.
50. I am comforted by the recommendation that the wider social development professional network is willing to continue to be involved with this family and, whilst I have

reservations with respect to the suggestion that for the children’s counselling to be effective, they must be separated, I am adopting a holistic evaluation to this matter. If the children are placed with one parent, I am of little doubt that resentment will grow in the absent parent once the litigation fatigue has passed and the damaging interaction will continue. Whilst perhaps somewhat an unorthodox approach I am therefore going to adopt the recommendations of the 27th October 2022 report with the modification that the children will spend holidays together such holidays to be divided equally between the parents. I am of the view that this has the best prospects of bringing about a result that is in the best interest of the children, that being having a working relationship with both parents where they [the parents] are also working in the children’s best interest.

51. In making the above decision I impress on the parents, that any order made by the Court in respect of children is never final and if difficulties arise as a result of the children being separated then the matter can **and should** be brought back before the Court.
52. I will hear counsel as to the form of order.

19th December 2022

**The Hon. Justice Anthony S. Gruchot
Judge**

